UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

REPUBLIC SERVICES, INC.

and Cases 25-CA-31683
25-CA-31708
INTERNATIONAL UNION OF OPERATING 25-CA-31709
ENGINEERS, LOCAL UNION NO. 150, 25-CA-31813
AFL-CIO, a/w INTERNATIONAL UNION

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for the Charging Party.

OF OPERATING ENGINEERS, AFL-CIO

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Rochester, Indiana on May 9-11, 2011. Operating Engineers Local 150 filed its first charge on November 17, 2010 and the fourth on April 5, 2011. The General Counsel issued the complaint on February 28, 2011. The Complaint in case 25-CA-31813 was issued and consolidated with the first three cases on May 6, 2011.

Respondent is a large nationwide company engaged in waste collection and disposal. It operates the Countyline Landfill near Argos, Indiana, the only facility at issue in this case. Respondent allegedly withdrew recognition of the Charging Party Union as the exclusive collective bargaining representative of its equipment operators and mechanics at the Countyline Landfill on November 11, 2010. The General Counsel contends that Respondent violated Section 8(a)(5) and (1) of the Act in doing so.

Respondent and the Union were parties to a collective bargaining agreement which expired on December 31, 2010. The General Counsel alleges that Respondent violated Section 8(a)(5) after November 11, 2010, by refusing to meet and bargain with the Union for a successor collective bargaining agreement.

The General Counsel also alleges that Respondent by Area Human Resources Manager Rodney Adkinson, violated Section 8(a)(1) of the Act by telling unit employees that they were no longer represented by the Union on November 12, 2010. He also alleges that on December 16, 2010, Respondent by General Manager Bob Walls violated Section 8(a)(1) by engaging in surveillance of employees' protected activities, and interrogating employees about their union sympathies.

Additionally, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by failing to adhere to its collective bargaining agreement with the Union prior its expiration. The General Counsel alleges in this regard that Respondent denied access of union officials to its facility on November 12, and December 13, 2010 and also limited their access to unit employees on December 16. The General Counsel further alleges that Respondent violated Section 8(a)(5) and failed to comply with its collective bargaining agreement with the Union by requiring Union representatives to be escorted by management when accessing the facility on December 16, failing and refusing to deduct union dues from employees' paychecks and failing to use the Union's hiring hall.

Also, the General Counsel alleges that Respondent violated Section 8(a) (5) and (1) by unilaterally implementing a 401(k) program and changing its health insurance program. Moreover, the record shows that Respondent unilaterally provided its health insurance benefits to one unit employee before its collective bargaining agreement with the Union had expired and offered these benefits to other unit employees prior to the expiration of the contract.

The General Counsel alleges that Respondent violated Section 8(a)(5) after the expiration of the collective bargaining agreement by giving unit employees a wage increase and changing the manner in which vacation benefits were accorded to unit employees.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent purchases and receives goods valued in excess of \$50,000 from outside of Indiana at its Indiana facilities. It is an employer within the meaning of Section 2 (2), (6) and (7) of the Act. The Charging Party is a labor organization within the meaning of section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union began representing unit employees at the Countyline Landfill in 1994. On January 1, 2009, Respondent merged with Allied Waste and began operating the landfill. It

¹ Tr. 27, line 29 should be November 9, 2010, rather than November 19.

The General Counsel's motion to make Respondent's Answer in docket 25-CA-31813 part of the formal papers is granted.

recognized the Union and agreed to abide by the collective bargaining agreement between Allied Waste and the Union.² That agreement ran from January 1, 2008 until December 31, 2010.

In August 2010, Respondent transferred Michael Beckley, the Operations Manager at its non-union Wabash, Indiana landfill, to the Argos/Countyline site to be the Operations Manager at that location. Beckley reports to Bob Walls, Respondent's General Manager. Also in August it hired Rodney Adkinson to be the Area Human Resource Manager for a number of facilities including Countyline.

In October 2010, Union Business Agent James Gardner sent a letter to Holly Ann Georgell, Respondent's Midwest Region Labor Relations Director, requesting bargaining for a successor agreement. On October 22, Georgell responded, asking Gardner to suggest dates in November 2010 for bargaining sessions.

On November 9, 2010, Respondent discharged 3 of the 6 employees then working at the Countyline landfill: Travis Pugh, Mike Fairchild and Jason Wiegand. On November 10, the Union filed a grievance concerning the three discharges, GC Exh. 4, Tr. 27-20. Later, the Union demanded arbitration on behalf of all three employees. One arbitration was held in May 2010, the others are scheduled for June 2010. The General Counsel does not allege that Respondent violated the Act in terminating the three employees.

On November 9, Respondent recalled Dennis Jaeger who had been laid off in early October. The same day, unit employee Carleen Condon spoke to Mike Beckley and told him that she and others no longer wished to be represented by the Union. Beckley referred Condon to Rodney Adkinson.

On November 10, Adkinson met with Condon and unit member Robert Styles. Labor Relations Director Georgell participated in the conversation by telephone. Both employees expressed concern regarding whether they might lose their health insurance and vested pension benefits if they withdrew from the Union. Adkinson held a separate meeting with Dennis Jaeger. Jaeger also expressed concerns about losing his vested pension benefits.

Georgell told Condon and Styles that if they wanted to decline further union representation, Respondent would need written notification to that effect. On November 11, Condon and Styles gave Adkinson written notices that they no longer wanted to be represented by the Union. Adkinson put these in a manila envelope which he gave to Beckley. Beckley put into the envelope a similar letter he received the same day from Dennis Jaeger.

Also, On November 11, Georgell sent Business Representative Gardner a letter which stated:

This will advise you that Republic Services has received objective evidence that a majority of the employees in the bargaining unit at the Countyline landfill no longer wish to be represented by the Operating Engineers Local 150. Based on that objective evidence, Republic doubts, in good faith, that the Union continues to represent the employees in the bargaining unit.

² The agreement was more technically between the Union and the Countyline Landfill Partnership.

Accordingly, by this letter, Republic Services withdraws recognition of the Union as the representative of the employees in the Countyline Landfill bargaining unit...

GC Exh. 8.

The text of the letter is noteworthy in that it does not acknowledge that Respondent had any obligation to comply with the collective bargaining agreement until it expired on December 31, 2010.

When filing its charge in this case, the Union has never contended that the employees' letters were tainted by employer involvement or Respondent's influence. The General Counsel also has never alleged this to be the case. The General Counsel's position is that Respondent was not entitled to withdraw recognition during the term of the collective bargaining agreement and did so. The General Counsel also alleges that Respondent was obligated to comply with the collective bargaining agreement until it expired and did not do so in several respects. As a result, he contends Respondent forfeited the right it otherwise would have had to refuse to negotiate a successor agreement. Finally, the General Counsel alleges that Respondent was not privileged to withdraw recognition until the grievances regarding the termination of the 3 employees were completely resolved.

Upon receipt of Respondent's November 11 letter withdrawing recognition, the Union requested commencement of negotiations for a successor agreement and suggested 7 dates on which it would be available for bargaining in November and December 2010. Republic has not responded to this request, which I infer is a refusal to negotiate a successor agreement.

On the morning of November 12, Respondent held a meeting for the remaining four unit employees; Condon, Styles, Jaeger and Shannon Pugh, the latter being the only one of the four who had not eschewed union representation. Pugh was apparently concerned that he was about to be terminated and called Union Business Agent Gardner. When Gardner came to the landfill, Georgell denied him access to the site or unit employees on the grounds that Respondent had withdrawn recognition from the Union.

Labor Relations Director Holly Georgell, Adkinson, Beckley and General Manager Bob Walls were present at this meeting. Georgell discussed the health insurance benefits and 401(k) plan available to Respondent's non-union employees. She advised the employees that these benefits would be immediately available to the employees.³ Moreover, despite Respondent's

³ Respondent's witnesses testified that they told the employees that the company's non-union benefits would be available to them immediately if they lost their benefits under the contract. I discredit this testimony. I find that on November 12, Respondent told the employees that the benefits were available to them immediately, as Rodney Atkinson stated in the affidavit given to the Board agent in the investigation of the Union's charges, Tr. 118-19. There is simply no alternative explanation for Respondent providing its benefits to Condon during the life of the contract in the absence of any evidence that the Union threatened to cut off her benefits during this period. This is also more plausible given the fact that on November 12 Respondent did not realize that it was obligated to recognize the Union until the collective bargaining agreement expired. Shannon Pugh's account of the November 12 meeting also leads me to believe that Respondent did not qualify its offer of benefits upon the employees losing their

denials, Rodney Adkinson's email correspondence with Respondent's benefit administrators also leads me to conclude that the non-union benefits were offered immediately. In this regard Adkinson wrote at 8:38 a.m. on November 12, Exh. CP-1:

As you probably know we have withdrawn recognition at County Line. I am at County Line today and have spoken with employees about their benefit changes. I plan to return Monday to assist them with the selection of their benefit plans...

Georgell testified that she also explained to the employees that Respondent had to honor its collective bargaining agreement with the Union until December 31, when the agreement expired and that Respondent would have to deduct union dues from their paychecks until December 31. I discredit this testimony.⁴

First of all, the November 11 letter Georgell sent to the Union indicates that she was not aware of Respondent's obligation to honor the contract until its expiration. Furthermore, her conduct on November 12, in refusing Business Representative Gardner access to the landfill and unit employees because Respondent had withdrawn recognition, belies her testimony, G.C. Exhs. 30 and 31.5 Respondent also immediately began dealing directly with unit employees by discussing the benefits they would received as non-union employees and immediately providing Carleen Condon with Respondent's health, vision and dental benefits.

Rodney Adkinson testified that on November 12, "we informed the employees that a majority of the employees there indicated that they no longer wanted to be represented by the Union, and that we had communicated that information to the Union," Tr. 109. Adkinson did not testify that employees were told that Respondent would honor the collective bargaining agreement until it expired.

In fact, Adkinson's testimony is further evidence that as of November 12, the management representatives present at the meeting with employees were not aware of their continuing obligations under the collective bargaining agreement.

Q. Now, it is true that during the discussions of this meeting, that the employees were told that dues would no longer be taken out of their paychecks?

union benefits during the life of the contract. Finally, Respondent sent unit employees plan enrollment documents indicating that they were eligible to participate in the plans as of November 12, 2010, GC Exh. 35

⁴ Respondent in its brief relies on Carleen Condon's testimony that she was informed by management that Republic Services would withdraw recognition "after the contract was up," Tr. 237. First of all, it is unclear whether Condon was speaking about something she was told on November 12, or at some other time. Moreover, Respondent's conduct was inconsistent with any pledge on November 12 to honor the contract until its expiration.

⁵ Georgell testified that she denied Gardner access to the site because he had not provided Respondent with 24 hours notice. She denied that she did so because Respondent had withdrawn recognition. The tape recording of her conversation with Gardner shows her testimony to be false. The collective bargaining agreement states that whenever possible, the business representative will provide the Site Manager with 24 hours advance notice of the visit. However, that was not possible in this case since unit member Pugh and Gardner were not provided notice of this meeting until the morning of November 12.

A. I believe that initially we did have some discussion as to whether or not dues would be—would continue to be taken out of the paychecks—but then we quickly realized that they had to continue to be – so it was one of those situations where I was not a hundred percent clear on everything that went on the course of the process that was happening.

Tr. 116-17.6

Indeed, union dues was not deducted from employees' December 3, 2010 paychecks covering the period November 21-27, and employees received a credit on that paycheck for the dues deducted for the pay period November 14-20. In the next two paychecks enough was deducted from employees' paychecks to cover the weeks in which dues were in arrears. Although Respondent, without credible testimony, attributes the failure to deduct dues and the credit on the December 3 paychecks to a clerical error, I infer that it was due to a belated realization that Respondent was legally required to deduct dues at least until December 31.

On November 12, Respondent began the process of transferring Wayne "Mike" Miller from its non-union Wabash facility to Countyline. Although Respondent characterizes this as a temporary transfer, Miller has worked at Countyline ever since mid-November. Respondent did not contact the Union's hiring hall to request a referral to fill the position occupied by Miller.

The General Counsel alleges that the transfer of Miller violates Article X of the collective bargaining agreement which provides:

The COMPANY recognizes that the UNION'S referral offices are a valuable source for qualified applicants and that the referral offices operate in a non-discriminatory manner. Consequently, whenever the COMPANY deems it necessary to hire an employee to perform work covered by this Agreement, the COMPANY will obtain all such employees through the referral offices of the UNION in accordance with the non-discriminatory provisions governing the operating of the UNION'S referral offices set out in the current effective Addendum No. 1.

The UNION shall have forty-eight (48) hours to refer to the COMPANY a qualified applicant for a job opening. In the event the UNION does not supply the COMPANY with a qualified applicant within the time limit specified, the COMPANY may hire any other applicant.

Respondent contends that it did not violate the collective bargaining agreement since it transferred Miller, who already worked for Respondent. It argues that it did not hire anyone and thus Article X is irrelevant to this case. I conclude that the General Counsel has not established

⁶ An affidavit Georgell gave to the Board Agent during the investigation also indicates that on November 12, Respondent was not fully aware of its obligations to comply with the collective bargaining agreement, Tr. 50-51.

At page 26 of its brief, Respondent relies on Adkinson's lack of experience with unions for the "impreciseness" of his correspondence. However, it is readily apparent that Georgell did not educate him regarding Respondents obligations under the NLRA on November 12. This is another reason I reject Respondent's contention that it made it clear to unit employees that it was going to adhere to the collective bargaining agreement until it expired.

that Respondent violated Article X and thus dismiss the allegation contained in complaint paragraph 7 (c)(iv) which alleges that Respondent violated the Act in ceasing to use the Union's hiring hall.

December 13 and 16, 2010

Business Agent Gardner requested access to the Countyline landfill and unit employees on Monday, December 13. Respondent initially authorized the visit, GC Exh. 26. Then on Sunday, December 12, Holly Georgell informed Gardner that his visit would have to be delayed due to weather conditions. Gardner and Business Representative Tom Lanahim showed up at the site anyway on December 13 and were told to come back. General Manager Walls told Gardner that Respondent wanted more management present on the site when it allowed Gardner access to the landfill.

The General Counsel alleges in complaint paragraph 7(a) that Respondent violated the Act by initially denying and later limiting the access of Union officials to Respondent's facility since on or about November 11, 2010. I view this as encompassing the events of December 13, and find a violation of Section 8(a)(5) and (1) as alleged.

When Gardner came to the site on December 16, he was told that he would have to be escorted around the landfill by General Manager Bob Walls and that he would not be allowed to take pictures at the site. Respondent had never required Gardner to have an escort previously, nor had it forbidden him to take photographs.

When Gardner went into the shop to speak with Shannon Pugh, management representatives, including Walls followed him. Walls stayed 15 feet from Gardner while he talked to Pugh. Then Walls and other management representatives accompanied Gardner around the site.

During the ride the occupants of the vehicle encountered Condon, Styles and Jaeger on separate occasions. Walls asked each employee if they wanted to speak to the union business representatives. Each said that they did not. Condon and Jaeger expressed hostility towards the Union

Unilateral Changes after the expiration of the collective bargaining agreement

After the expiration of the contract on January 1, 2011, Respondent implemented several unilateral changes in wages and working conditions of unit employees. In February 2011 it changed its vacation pay policy to comport with that at other non-union locations. In March, it raised unit employees' wages. Given my conclusion that Respondent was not obligated to recognize and bargain with the Union after the expiration of the collective bargaining agreement, I find these changes did not violate the Act and dismiss paragraph 6 of the complaint in case 25-CA-31813.

Analysis

In order to withdraw recognition from an incumbent union, an employer must show that the Union had actually lost its majority status when the Respondent withdrew recognition, *Levitz*

Furniture Co. of the Pacific, 333 NLRB 717 (2001). In Levitz, the Board overruled the line of cases permitting withdrawal of recognition from an incumbent union on the basis of the employer's good faith doubt as to the union's majority status.

An employer may not lawfully withdraw recognition while a collective bargaining agreement is in effect, because an incumbent union enjoys a conclusive presumption of majority status during the life of the contract (up to 3 years), *Auciello Iron Works, Inc. v. NLRB,* 517 U.S. 781, 187 (1996). However, under the "anticipatory withdrawal" cases, an employer faced with evidence that an incumbent union has lost majority support during the term of collective-bargaining agreement may lawfully refuse to negotiate a successor agreement and announce that it will not recognize the Union after the contract expires, *Abbey Medical,* 264 NLRB 969 (1982), enfd. Mem. 709 F.2d 1514 (9th Cir. 1983). The loss of majority support on which the employer relies cannot be the result of unfair labor practices. Moreover, such an employer must continue to recognize and bargain with the union until the collective bargaining agreement expires.

On November 11, 2010 Respondent had evidence that the Union had lost majority status in the Countyline unit, assuming that it was entitled to exclude the three terminated employees from its calculation of the number of employees in the bargaining unit. The General Counsel argues that Respondent was not entitled to withdraw recognition until the grievances filed by the three discharged employees are resolved, citing *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1365 (1962). That case and others relying on it, such as *Grand Lodge Int'l Association of Machinists*, 159 NLRB 137, 142 (1966) and *Ms. Desserts, Inc.*, 299 NLRB 236 (1990), arise in the election context. The Board has never held that an employer may not withdraw recognition because an employer cannot demonstrate a loss of majority support (or a good faith belief) due to the fact that grievances were pending regarding the termination of unit employees. In light of this, I decline to find that Respondent's withdrawal of recognition and/or anticipatory withdrawal of recognition violated the Act on this basis.

Pacific Tile & Porcelain involved a situation in which the ballots of 251 out 275 potential voters were challenged. Most of these challenges had to do with the status of economic strikers and their replacements. Only two involved terminated employees for whom grievances were pending, thus the Board's ruling on these two employees was not nearly as consequential as it would be in the instant case. While the dissenting Board members would have sustained the challenges to the two terminated employees, the majority deferred ruling until it could be determined if the two votes would be determinative of the outcome. If so, it directed the Regional Director to make a further investigation and report if necessary.

In *Grand Lodge*, the Board ordered that employees seeking reinstatement pursuant to the LMRDA be allowed to vote subject to challenge. In *Ms. Desserts*, the Board ordered that a terminated employee's ballot be counted after the arbitrator had ruled that he was unjustly terminated.

I conclude that these cases cannot be read for the proposition that an employer may not withdraw recognition or anticipatorily withdraw recognition because a sufficient number of grievances regarding termination are pending. Of course, if the arbitration results in the reinstatement of the three employees, Respondent will be obligated to resume recognition of the Union and bargain with it upon request for a successor contract.

There is no allegation or evidence that Respondent's termination of the three employees violated the Act or that letters from the other three employees expressing a desire to terminate their union representation was tainted in any way by Respondent's involvement. However, Respondent's November 11, 2010 letter to the Union clearly goes beyond what it was legally entitled to do with this evidence and violates Section 8(a)(5) and (1) of the Act. The letter purports to withdraw recognition without qualification. All that Respondent was entitled to do on November 11, 2010 was to inform the Union that it would not negotiate a successor agreement and announce that it would not recognize the Union after its contract with the Union expired on December 31, 2010.

Respondent also engaged in direct dealing with its represented employees by offering them the benefits to which they were entitled as unrepresented employees. It also violated the Act by unilaterally providing medical, dental and vision insurance benefits to Carlin Condon almost immediately after the November 12 meeting, Exh. R-3a., over a month prior to the expiration of the collective bargaining agreement.⁷

Respondent, by Bob Walls and other managers, violated Section 8(a)(5) by requiring the union agents to have a management escort at the landfill on December 16. Moreover, Respondent, by insisting on this escort engaged in surveillance of employees' union and protected activities. It did so by observing Gardner's conversations with Shannon Pugh in the shop and by allowing Gardner to speak with unit employees only the presence of its managers. Moreover, Walls, in asking the three employees whether they wanted to speak with Gardner interrogated them in violation of Section 8(a)(1). It does not matter that all three had indicated a desire to withdraw from the Union. They had a Section 7 right to decide for themselves, outside of the view of management, whether or not they wanted to talk to Gardner.

One cannot assume that any of the three would necessarily have declined to talk to Gardner outside of the view and presence of management. Although there is no evidence that the three recent terminations had anything to do with union or protected activities, it is not so certain that all unit employees were convinced of this. The recent terminations may well have restrained one or more employees from talking to union representatives in circumstances in which management was aware that they did so voluntarily.

These employees may have been willing to tell Gardner why they no longer wanted to be represented. With respect to employee Styles, in particular, it is conceivable that he would have been willing to talk frankly to Gardner in the absence of management—even to the point of reconsidering his decision to terminate his relationship to the Union.

Respondent's interference with Gardner's access to employees on November 12 and December 16 is significant. The Union had a right under the collective bargaining agreement to

⁷ I find that Respondent also temporarily violated the Act in failing to deduct union dues for the pay periods November 14-27. However, Respondent quickly rectified this violation. However, this and the fact that it continued to adhere to most of the terms of the collective bargaining agreement does not cure Respondent's violation in withdrawing recognition on November 11. In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) the Board found that in order to cure a statutory violation, the charged party's repudiation of its violative conduct must be 1) timely, 2) unambiguous, 3) specific to the coercive conduct and 4) free from other prescribed illegal conduct.

unfettered access to unit members. Unit employees had the right to talk to union representatives in private, without Respondent knowing that they did so. Had Respondent not interfered with that right, it is possible that the Union could have addressed and remedied the reasons for which they had indicated their desire to withdraw from the Union and/or demonstrated to at least some of the unit employees that the benefits of continued union representation outweighed the reasons for their dissatisfaction with that representation.

Packwood Developmental Center, 347 NLRB 974 (2006) enfd. 518 F.3d 256 (4th Cir. 2008) is instructive in this regard. In that case the Employer received a petition from a majority of unit employees stating that they no longer wished to be represented by the Union three months prior to the expiration of its collective bargaining agreement with the Union. The employer, consistent with the "anticipatory withdrawal" line of cases, informed the Union that it would continue to adhere to the contract but would not negotiate for a successor agreement. However, the day before the contract expired the Union presented the employer evidence that it had regained majority support. The employer ignored this evidence and continued to refuse to recognize the Union. The Board found that the employer violated the Act in so doing and ordered it to recognize and bargain with the Union.

Similarly, in *HQM of Bayside, LLC*, 348 NLRB 787 (2006) enfd. 521 F.3d 404 (D.C. Cir. 2008), 13 employees who signed a decertification petition in September 2002 stating they no longer wanted union representation, signed a counter petition in early November stating that they did not want to withdraw recognition and representation of the Union. The Board found that the employer was not privileged to ignore the counter petition and withdraw recognition of the Union when the contract expired on November 30, 2002. In the instant case it is conceivable that one or more of Respondent's employees, most notably Mr. Styles, could have changed their minds regarding union representation in the absence of Respondent's unfair labor practices. In preventing these employees from contact with union business representative Gardner out of view of management, Respondent interfered with the employees' free choice regarding their Section 7 rights.

Offering company health and welfare benefits to employees and providing such benefits to Carleen Condon before the contract expired constitutes a clear violation of Section 8(a)(5) and (1) and Section 8(d) of the Act, *Wightman Center*, 301 NLRB 573, 575-76 (1991); *HCL, Inc.*, 981, 982-83 (2004). Nothing in this record indicates that the union's health insurance that covered Ms. Condon through December 31, 2010 would have lapsed had Respondent not provided her the health insurance that it provides to unrepresented employees.

Despite all of the above, the Board's Burger Pits decision leads me to reject the General Counsel's plea for a bargaining order.

In *Burger Pits*, 273 NLRB 1001 (1984) enfd. 785 F. 2d 796 (9th Cir. 1986),⁸ the Board found that the Employer violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, making unilateral changes and otherwise failing to comply with their collective

⁸ As discussed below, *Burger Pits* is not an anticipatory withdrawal case and neither is the instant case. *Burger Pits* stands for the proposition that the Board will not require the employer to bargain with the Union if it withdraws recognition close in time to the expiration of the collective bargaining agreement.

bargaining agreement 24 days prior to its expiration. However, the Board declined to order the Employer to recognize and bargain with the Union beyond the expiration date of the contract. In doing so, the Board stated, "...the Respondent would have been privileged to withdraw recognition from the Union and implement unilateral changes upon the expiration of the contract...The Respondent's misconduct consisted simply of taking those measures prematurely..."

The facts as stated by the Board in *Burger Pits* make it virtually impossible to distinguish that case from this one. The parties in *Burger Pits* had a contract from June 1, 1977 to May 31, 1980. During negotiations on May 29, 1980, the parties agreed to extend the existing contract until June 30, 1980. On June 3, the employer, which operated a chain of 15 restaurants, received a petition indicating that a majority of unit members no longer wished to be represented by the Union. On June 6, 24 days before the expiration of the contract, the employer withdrew recognition, unilaterally instituted new health and welfare coverage, unilaterally ceased making required contributions to the Union's health and welfare fund and pension plan and refused to grant union representatives access to the kitchen areas of the facilities.

The General Counsel argues that the current Board is more likely to rely on its decision in *Spectrum Health-Kent Community Campus*, 355 NLRB No.101 (2010) adopting the Judge's decision for reasons stated at 353 NLRB 996 (2009), than on *Burger Pits*. He does not argue that *Burger Pits* has been overruled or that the decision can be distinguished from the instant case.

Respondent argues that *Spectrum Health* is irrelevant to the instant matter in that it was not an anticipatory withdrawal case, but as I have found neither is this one. Spectrum Health alleged that it had a right to withdraw recognition on January 7, 2008 because the collective bargaining agreement had expired. The Board found that the contract did not expire until one minute after midnight on April 1, 2008. After withdrawing recognition, Spectrum immediately stopped (and did not resume) deducting dues and refused to process grievances. In March 2008 it made wholesale changes to unit members' wages.

This case is distinguishable from *Spectrum Health* in that Respondent did not completely repudiate its obligations under the collective bargaining agreement prior to December 31, 2010. It continued to process grievances and continued, albeit belatedly, to deduct union dues. It also appears that Respondent continued to make the payments to the Union's benefit funds that it was required to make pursuant to the contract. Respondent also did not make any changes in unit members' wages and other terms and conditions of employment (except for Ms. Condon's health insurance) until after the collective bargaining agreement expired.

If forced to summarize what the *Burger Pits* and *Spectrum Health* stand for, I would offer the opinion that an employer will not be required to bargain with a union if it withdraws recognition within 24 days of the expiration of its collective bargaining agreement, but will be required to bargain if it withdraws recognition 83 days before the expiration date. Indeed, Respondent in its brief distinguishes *Burger Pits* and the instant case from the Board's decision in *Syscon International, Inc.*, 322 NLRB 539 (1996) on the basis on the timing of the employer's withdrawal compared to the expiration date of the collective bargaining agreement. In *Syscon*, the employer withdrew recognition 19 months prior to the contract's expiration date.

Respondent interfered with its employees' Section 7 rights

Respondent violated employees' rights by not allowing them to decide freely whether or not to speak to their bargaining representative. By doing so, Respondent interfered with their right to decide without coercion whether they wished to be represented by the Union beyond the expiration of the collective bargaining agreement. As the Board noted in *Spectrum Health*, quoting from *Union Fish*, 156 NLRB 187 at 191 (1965), the contract bar rule serves two objectives: industrial stability and *the opportunity to select bargaining representatives at reasonable and predictable intervals*.

The latter right is similar to the right of the electorate in American elections. The popularity of our elected officials may ebb and flow, but it is only their popularity among the voters on election day that determines whether they remain in office. To use a historical analogy, by all accounts had the presidential election of 1948 been held in September rather than November, President Truman would almost certainly have been handily defeated by Governor Dewey. However, by election day, President Truman had recaptured the support of a plurality of the electorate.

In interfering with the Union's access to unit members, Respondent prohibited the Union from attempting to recapture its majority status. Moreover, by interfering with employee access to their bargaining representatives, Respondent interfered with the right of employee free choice at the intervals mandated by the Act.

Regardless, the *Burger Pits* decision allows an employer who can establish that the Union has lost majority status to jump the gun by at least a little bit (it's not, however, clear by how much) in withdrawing recognition and then ceasing to comply with a collective bargaining agreement. Whether or not the decision is sound, I am not at liberty to ignore it and thus deny the General Counsel's request for a bargaining order. However, should the arbitrator reinstate the 3 terminated employees, the General Counsel may wish to petition the Board to reopen the record in this matter.

CONCLUSIONS OF LAW

Respondent, Republic Services, Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) by the following conduct:

- 1. Withdrawing recognition of the Union on November 11, 2010.
- 2. Denying union officials access to Respondent's facility on November 12, and December 13, 2010.
- 3. Requiring Respondent's agents to accompany union representatives while at Respondent's facility on December 16, 2010.
 - 4. Temporarily ceasing the deduction of union dues from employee's paychecks.
 - 5. Unilaterally offering unit employees 401(k) and health insurance benefits during the

life of its collective bargaining agreement with the Union.

6. Unilaterally providing health insurance benefits to Carleen Condon during the life of the collective bargaining agreement.

7. Respondent also engaged in unfair labor practices within the meaning of Section 8(a)(1) on December 16, 2010 by engaging in the surveillance of employees' union activities and in interrogating them as to whether they wished to speak to union representatives.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Republic Services, Inc., its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Coercively interrogating any employee about union support or union activities.
- (b) Placing under surveillance the union or other protected activities of employees.
- (c) Failing to adhere to all the terms of a collective bargaining agreement until the date of its expiration, including, but not limited to providing union representatives access to its employees.
 - (d) Dealing directly with employees when they are represented by a labor organization.
- (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its Argos, Indiana landfill copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 11, 2010

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 21, 2011.

Arthur J. Amchan Administrative Law Judge

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT place your union or other protected activities under surveillance.

WE WILL NOT deal with you directly when you are represented by a labor organization, including International Union of Operating Engineers, Local No. 150.

WE WILL NOT unilaterally offer or provide you benefits during the life of any collective bargaining agreement we have with any labor organization, including International Union of Operating Engineers, Local No. 150.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL adhere to all the terms and conditions of any collective bargaining agreement that we may have with any labor organization, including International Union of Operating Engineers, Local No. 150.

		REPUBLIC SERVICES, INC	
		(Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577 (317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.